



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

December 10, 2002

Ms. Janice Mullenix
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2002-7022

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173382.

The Texas Department of Transportation (the "department") received a written request for certain categories of information pertaining to a highway construction project in Van Zandt County. You contend that the requested information is excepted from required disclosure pursuant to sections 552.104 and 552.110 of the Government Code.

Section 552.104 of the Government Code protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The primary purpose of section 552.104 is to protect the government's interests in competitive bidding situations. For example, section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.,* Open Records Decision No. 463 (1987). In these situations, the exception protects the government's interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract. *See* Open Records Decision No. 306 (1982). Section 552.104 does not, however, except bids or proposals from disclosure once the bidding is over and the contract is in effect, Open Records Decision Nos. 306 (1982); 184 (1978), or where no contract is awarded. Open Records Decision No. 201 (1978).

In this instance, you inform us that the competitive bid to which the requested information pertains has been awarded. You contend, however, that because a similar bid is currently pending, the release of Exhibits B, C, and D at this time "could affect the competitive balance among the bidders for the new project and undermine the competitive position of any or all of them." You have not explained, however, why this would be the case. We therefore conclude that you have not met your burden of establishing that the release of Exhibits B, C,

and D "would give advantage to a competitor or bidder." Consequently, the department may not withhold the requested information pursuant to section 552.104. Because you do not raise any other exception for Exhibit B, we conclude that those documents must be released.

You also contend that Exhibits C and D are excepted from public disclosure pursuant to section 552.110 of the Government Code. Section 552.110 of the Government Code excepts from required public disclosure "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." You contend that section 552.110 protects the information in Exhibits C and D because "release of the requested information in Exhibits C and D would adversely affect [the department's] ability to obtain similar information in the future." This argument, expressing the commercial interests of the department, evidently relies on the test announced in *National Parks* pertaining to the applicability of the section 552(b)(4) exemption of the federal Freedom of Information Act to third party information held by a federal entity. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); *see also Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (commercial information is excepted from required public disclosure if the information is voluntarily submitted to government and the information is of a kind that the provider would not customarily make available to the public).

Although this office at one time applied the *National Parks* test to the statutory predecessor to section 552.110, that standard was overturned by the Third Circuit Court of Appeals when it held that *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of American Insurers*, 994 S.W.2d 766 (Tex. App.--Austin 1999, *pet. denied*). Section 552.110(b) now expressly states the standard to be applied and requires that the third party whose information is at issue make a specific factual or evidentiary showing that disclosure of its information would likely result in substantial competitive injury to itself. *See also* Open Records Decision No. 661 at 5-6 (1999). Consequently, Exhibits C and D may be withheld only if the interested third parties establish that these records are excepted from required public disclosure.

In this regard, you have also requested a decision from this office regarding Exhibits C and D pursuant to section 552.305 of the Government Code, which allows governmental bodies to rely on third parties having a privacy or property interest in the information to submit their own arguments as to why the requested information should be withheld from the public. In accordance with section 552.305(d), the department notified the interested third parties of the records request and of their right to submit arguments to this office as to why portions of the requested records should not be released to the public. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if

any, as to why information relating to that party should be withheld from public disclosure. See Gov't Code § 552.305(d)(2)(B).

This office did not receive a response from either of the interested parties indicating that they wished to have any portion of the requested information withheld from the public. This office therefore has no basis for concluding that these companies have a proprietary interest in Exhibits C and D. Therefore, the department must release the requested information to the requestor in its entirety.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

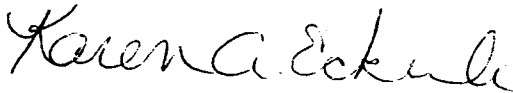
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/RWP/lmt

Ref: ID# 173382

Enc: Submitted documents

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